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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. D'ANDRE MOORER, Defendant and Appellant.	B205740 (Los Angeles County Super. Ct. No. BA286416)

APPEAL from a judgment of the Superior Court of Los Angeles County. Rand S. Rubin, Judge. The judgment of conviction is affirmed and the matter is remanded for resentencing.

Tracy J. Dressner, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, James William Bilderback II and Marc A. Kohm, Deputy Attorneys General, for Plaintiff and Respondent.

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Appellant D'Andre Moorer appeals from a judgment entered after a jury returned a guilty verdict against him on count 1, murder of Michael Livingston (Pen. Code, § 187, subd. (a)).[1] The jury found true that the murder was committed by means of discharging a firearm from a motor vehicle (§ 190.2, subd. (a)(21)), that a principal personally and intentionally discharged a firearm causing death (§ 12022.53, subds. (d), (e)(1)), and that the crime was committed in association with a criminal street gang (§ 186.22, subd. (b)(1)(A).) Appellant pled guilty to count 2, possession of a firearm by a felon. (§ 12021, subd. (a)(1).)

Appellant was sentenced to life in prison without the possibility of parole (LWOP) as to count 1, plus 25 years to life for the firearm enhancement plus a consecutive term of eight months (one-third the midterm) as to count 2. The abstract of judgment reflected that the firearm enhancement was stayed. Appellant also received 877 days of custody credit.

Appellant contends that: (1) the evidence was insufficient to prove beyond a reasonable doubt that appellant aided and abetted the murder of Livingston; (2) the trial court committed reversible error by allowing the gang expert to opine that appellant knew his passenger had a gun; and (3) the trial court erred in imposing a stayed parole revocation fine because appellant was sentenced to life imprisonment without the possibility of parole. The People urge that: (1) the firearm enhancement must be imposed consecutively to appellant's LWOP sentence; (2) count 2 was the sole determinate term and therefore must be imposed in full; (3) appellant was convicted of two crimes and therefore must be ordered to pay two court security fees; and (4) the parole revocation fine must be stricken.

We remand the matter for resentencing on count 2 and order the trial court to correct the abstract of judgment as directed in the disposition. In all other respects, the judgment is affirmed.

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[1] All further statutory references are to the Penal Code unless otherwise indicated.

FACTS AND PROCEDURAL BACKGROUND

Viewing the whole record in the light most favorable to the judgment below as we must (*People v. Ceja* (1993) 4 Cal.4th 1134, 1138-1139), the evidence established the following. On March 29, 2005, appellant, a member of the Eight-Trey Hoovers gang known as "Scandalous D," was driving to Las Vegas with fellow gang member Donald "Baby Jap" Shorts (Shorts) and Shorts' girlfriend Gloria Ramirez (Ramirez). On the freeway, appellant, who was the driver, drove near Michael Livingston, a member of the Long Beach O-Hood Crips gang, which was a rival to the Hoovers gang. Livingston, who was on the left side of appellant's car, exchanged gang signs and angry words with appellant and Shorts, who was in the front passenger seat. Livingston slowed down, dropped back, and moved to the right side of appellant's car. Appellant slowed down, keeping pace with Livingston, as the men continued to yell at each other.

From the backseat, Ramirez could see Shorts' hands, back and shoulders moving. Ramirez ducked her head, believing that something bad was about to happen. Ramirez did not want to hear more arguing. She closed her eyes and began praying because of the behavior of appellant and Shorts. Maria Hernandez and Gladys Medrano, who were driving behind appellant, believed the occupants of the vehicles were going to argue or fight because they both slowed down, moved close together, and drove next to each other. Shorts fired four shots, shooting Livingston twice in the head, killing him and causing the car to crash. Appellant immediately exited the freeway, got back on, and drove to Las Vegas, laughing and exchanging jokes with Shorts.

Ramirez testified that Shorts shot Livingston because the men threw gang signs at each other. Ross Garrett, a fellow gang member of Livingston, testified that when rivals throw gang signs at each other, anything can happen, including murder. Los Angeles Police Officer Mario Cardona, a gang expert, testified that members of the Hoovers gang gain respect by committing violent crimes, including murder, and

expect members to violently confront rivals, at the risk of losing respect and being attacked by fellow gang members. A younger gang member, who would not do anything to anger a senior member, is expected to protect the older member and to tell him if he is armed. He testified that appellant was well respected within the Hoovers gang and had been a member for at least seven years.

DISCUSSION

I. Substantial evidence supported the jury's finding that appellant aided and abetted the murder of Livingston

Appellant contends that the evidence was insufficient to prove beyond a reasonable doubt that he aided and abetted the murder of Livingston because the evidence did not support the finding that appellant knew that Shorts had a gun or that Shorts intended to shoot Livingston. We disagree.

All persons concerned in the commission of a crime, whether they directly commit the crime or aid and abet in its commission, are principals in any crime so committed. (§ 32; *People v. McCoy* (2001) 25 Cal.4th 1111, 1118.) In order to show accomplice liability, the prosecutor must prove that the defendant acted with knowledge of the criminal purpose of the perpetrator and with the intent or purpose of committing, or of encouraging commission of the offense. (*People v. McCoy*, *supra*, at p. 1118.) There is rarely direct evidence of the defendant's intent, but evidence of intent can be derived from all the circumstances, including the defendant's actions. (*People v. Smith* (2005) 37 Cal.4th 733, 741.) Moreover, evidence of motive is often, but not always, probative of intent. (*Ibid*.)

"[A]n aider and abettor's liability for criminal conduct is of two kinds. First, an aider and abettor with the necessary mental state is guilty of the intended crime. Second, under the natural and probable consequences doctrine, an aider and abettor is guilty not only of the intended crime, but also 'for any other offense that was a "natural and probable consequence" of the crime aided and abetted.' [Citation.] Thus, for example, if a person aids and abets only an intended assault, but a murder results,

that person may be guilty of that murder, even if unintended, if it is a natural and probable consequence of the intended assault. [Citation.]" (*People v. McCoy, supra,* 25 Cal.4th at p. 1117.)

Appellant urges his conviction under the aider and abettor theory turned on whether he knew that Shorts had a gun and intended to use a gun. But, his arguments merely reframe the evidence. "[I]t is the *jury*, not the appellate court, which must be convinced of the defendant's guilt beyond a reasonable doubt. [Citation.] Therefore, an appellate court may not substitute its judgment for that of the jury." (*People v. Ceja*, *supra,* 4 Cal.4th at pp. 1138-1139.) We do not reweigh the evidence; even if the circumstances "might reasonably be reconciled with a contrary finding[, this] would not warrant reversal of the judgment." (*People v. Proctor* (1992) 4 Cal.4th 499, 529.)

Appellant argues that there was no evidence appellant knew the gun was in the car. He claims Ramirez did not know that Shorts had a gun, did not hear appellant tell Shorts to shoot Livingston, and did not see appellant hand Shorts a gun. He also urges that his gang membership alone did not prove his intent to assist Shorts in the murder. Rather, he argues, Livingston and not appellant, repositioned his car. Appellant insists that his jocular attitude after the murder, lack of remorse, failure to report the incident to the police, possible benefit from the shooting, and act of driving away after the shooting, were not evidence that he harbored the requisite mental state. He urges that driving in a straight and steady manner is the preferred driving method for freeway drivers, and that he did not veer when Shorts fired simply because he was not the shooter. Finally, he argues that the expert's opinion that Shorts must have told appellant he had a gun was based on speculation.

Appellant's version of the facts is not sufficient as a matter of law to persuade us that appellant did not harbor the requisite mental state. (*People v. McCoy*, *supra*, 25 Cal.4th at p. 1123 [where both the defendant and codefendant in drive-by shooting fired at a group of people, the jury could find that the defendant knew of the codefendant's unlawful purpose and intent to shoot the murder victim under aider and

abettor liability theory].) Appellant did not testify and we can only derive his intent from the circumstances of the incident, including his own actions. The evidence showed that appellant and Shorts, who were members of the Hoovers gang, engaged in a confrontation with Livingston, who was from a rival gang. The men yelled at each other and threw gang signs and Livingston maneuvered his car so that he was to the right of appellant's car. The jury could well conclude that rather than driving away from Livingston, appellant intentionally slowed down and matched Livingston's speed to help Shorts shoot Livingston. Indeed, Hernandez and Medrano believed that the men were about to fight because the cars slowed down and maintained their position side by side. In fact, before Shorts fired the gun, Ramirez could see that he was moving his shoulders and arms in the front of the car so she ducked her head because she knew that something bad was going to happen. She also closed her eyes and began praying. From this evidence the jury could infer that appellant, in the driver's seat with a clear view of Shorts, knew that Shorts was getting ready to shoot at Livingston.

And, appellant did not exhibit surprise when Shorts shot Livingston. The subsequent conduct of appellant may be relevant to prove motive and intent. (*People v. Campbell* (1994) 25 Cal.App.4th 402, 409 [jury could reasonably conclude that the defendant intended to aid and abet codefendant by remaining in position in front of the robbery victims and failing to show surprise at codefendant brandishing a firearm at the victims].) After the shooting, appellant immediately got off the freeway, then got back on and continued to drive to Las Vegas, laughing and joking with Shorts. We conclude that the evidence was sufficient to support the jury's conclusion that appellant intended to assist Shorts in shooting Livingston.

Further, Officer Cardona's testimony, the admissibility of which is challenged by appellant as discussed in part II of the Discussion, also provided evidence that appellant knew Shorts was armed and that he wanted to kill Livingston. Officer Cardona opined that a Hoovers gang member would be expected to attack a rival who

flashed a gang sign, or risk losing respect. He also stated that a younger member would not do anything to anger an older member, and that he would be expected to tell the senior member that he had a firearm.

We conclude that the People proved beyond a reasonable doubt that appellant had the mens rea necessary to establish that he aided and abetted Shorts' actions.

II. The trial court did not abuse its discretion in admitting the testimony of Officer Cardona

Conceding that much of Officer Cardona's expert testimony was properly admissible, appellant challenges the trial court's admission of Cardona's opinion that an experienced Hoover gang member would know that a younger gang member was armed and would want to help the younger gang members shoot a rival gang member. We conclude that the trial court did not abuse its discretion in admitting the expert testimony.

Evidence Code section 352 provides that a trial court may exclude evidence if its probative value is substantially outweighed by the probability that its admission will create a substantial danger of undue prejudice. An expert witness may testify to a subject that is sufficiently beyond common experience so that the opinion of an expert would assist the trier of fact. (Evid. Code, § 801, subd. (a).) Expert testimony concerning the culture, habits, and psychology of gangs is admissible as subject matter which is sufficiently beyond common experience so that the opinion of an expert would assist the trier of fact. (*People v. Gardeley* (1996) 14 Cal.4th 605, 616-617.) "'Evidence of the defendant's gang affiliation—including evidence of the gang's territory, membership, signs, symbols, beliefs and practices, criminal enterprises, rivalries, and the like—can help prove identity, motive, modus operandi, specific intent, means of applying force or fear, or other issues pertinent to guilt of the charged crime. [Citations.]' [Citation.]" (*People v. Albarran* (2007) 149 Cal.App.4th 214, 224 (*Albarran*).) "[A]n expert may render opinion testimony on the basis of facts given 'in a hypothetical question that asks the expert to assume their truth.'" (*People v.*

Gardeley, *supra*, at p. 618.) And, an expert witness may state on direct examination the reasons for his opinion and the matter upon which it is based, even if that matter is ordinarily inadmissible, as long as the threshold requirement of reliability is satisfied. (*Ibid.*; Evid. Code, § 802.) We review the trial court's decision to admit gang evidence over an Evidence Code section 352 objection for abuse of discretion. (*People v. Gardeley*, *supra*, at p. 619.)

Expert witness opinion regarding gang members' motives for seeking out persons who crossed out their graffiti and their violent response to yelling out of gang names has been found admissible. (*People v. Olguin* (1994) 31 Cal.App.4th 1355, 1371.) And, expert opinion that a gang member driver in a drive-by shooting usually participates as a gang member is also admissible. (*People v. Gutierrez* (1993) 14 Cal.App.4th 1425, 1433-1434.) Here, the People posed a series of hypotheticals to Officer Cardona regarding whether a gang member in the same position as appellant would have known that the shooter was armed and would have intended to help the shooter.[2] Officer Cardona opined that gang members let each other know if they possess a gun in case they are confronted by rival gang members or need to plan on how to dispose of it if they are stopped by police. He also testified that a younger gang member would tell an older member that he had a gun to avoid doing something that would get the older gang member into trouble. Officer Cardona testified that several gang members had explained these practices to him. Officer Cardona opined that both gang members in the hypothetical would understand that retaliation would occur, that some type of communication would have had to take place, and that the driver's reputation that would increase as a result of the act.

Citing *People v. Killebrew* (2002) 103 Cal.App.4th 644 (*Killebrew*), appellant contends that the trial court abused its discretion in allowing the expert to testify that

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[2] The trial court sustained an objection to previous questions in which the People used appellant's name in the hypothetical.

appellant knew there was a gun in the car and knew that the gun might be used to shoot a rival gang member. *Killebrew*, *supra*, 103 Cal.App.4th at page 658, has been read to mean merely that an expert is prohibited "from testifying to his or her opinion of the knowledge or intent of a defendant on trial" and that "[i]t would be incorrect to read *Killebrew* as barring the questioning of expert witnesses through the use of hypothetical questions regarding hypothetical persons." (*People v. Gonzalez* (2006) 38 Cal.4th 932, 946, 947, fn. 3.) Thus, an expert may render opinion testimony on the basis of facts given in a hypothetical question that asks the expert to assume their truth. (*Id.* at pp. 946-947 [expert may testify as to whether hypothetical persons in the position of those who testified at trial would feel intimidated].) We conclude that the trial court did not err in admitting the expert's testimony.

In any event, even were the admission of the expert's opinion an abuse of discretion, the error was harmless because it is not reasonably probable that appellant would have received a more favorable result if that portion of the expert's testimony had been excluded. (*People v. Watson* (1956) 46 Cal.2d 818, 836.) The evidence showed that appellant drove in a manner to assist the shooting; Shorts was making movements in the front seat preparatory to shooting Livingston; and the parties engaged in throwing gang signs and hostile language prior to the shooting. And, appellant concedes that much of the expert testimony was properly admissible, including testimony about the history, structure, territory, rivals, role of respect and disrespect, graffiti, crimes, and violence in the gang culture.

We conclude that the trial court did not abuse its discretion in admitting the expert opinion, but in any event the admission of the evidence was harmless error.

III. Sentencing errors

A. The firearm enhancement must be imposed consecutively to appellant's LWOP sentence

The People urge that as to count 1, the trial court sentenced appellant to an LWOP sentence, plus a consecutive term of 25 years to life for the firearm

enhancement. The abstract of judgment indicates that the firearm enhancement was stayed. The abstract of judgment must be corrected to conform to the sentence ordered by the trial court. (*People v. Boyde* (1988) 46 Cal.3d 212, 256, overruled on another point *sub nom. Boyde v. California* (1990) 494 U.S. 370.) Appellant does not address this issue in his reply brief.

B. Count 2 was the sole determinant term and must be imposed in full

The trial court imposed an indeterminate term of LWOP in count 1. As to count 2, the trial court imposed one-third the midterm. "[W]hen one term is determinate and the other is indeterminate, neither is principal or subordinate; instead, each is calculated without reference to the other." (*People v. Reyes* (1989) 212 Cal.App.3d 852, 858; Cal. Rules of Court, rule 4.451(a).) Because count 2 was the only count with a determinate term, the trial court should have chosen among the high, mid and low terms and imposed its choice in full. The matter shall be remanded to permit the trial court to exercise its discretion. (*People v. Keelen* (1998) 62 Cal.App.4th 813, 820.) Appellant does not address this issue in his reply brief.

C. Appellant shall be ordered to pay two court security fees

The trial court ordered appellant to pay a single $20 court security fee. But, a defendant convicted of two crimes must be ordered to pay two $20 court security fees. (§ 1465.8, subd. (a)(1).) Appellant does not address this issue in his reply brief.

D. The parole revocation fine shall be stricken

Appellant contends, and the People concede, that the trial court's imposition and suspension of a parole revocation fine as reflected in the abstract of judgment must be stricken because appellant was sentenced to an LWOP sentence. (*People v. Jenkins* (2006) 140 Cal.App.4th 805, 819.)

DISPOSITION

The matter shall be remanded for resentencing as to count 2, to permit the trial court to exercise its discretion in choosing among the high, mid and low terms. The abstract of judgment shall be corrected to: strike the parole revocation fine; reflect that the 25 year to life firearm enhancement in count 1 must be served consecutive to the LWOP sentence, rather than stayed; and reflect that appellant shall pay two $20 security fees. The trial court is ordered to send a certified copy of the corrected abstract of judgment to the Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, P. J.
BOREN

We concur:

_____, J.
DOI TODD

_____, J.
CHAVEZ